IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0806

HENRY JO WARD,
DEFENDANT BELOW,

PETITIONER,

Appeal from an Order of the Circuit Court of Fayette County, (Indictment No. 21-F-150)

v.

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW,

RESPONDENT.

PETITIONER'S REPLY BRIEF

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I. Petitioner's conviction of Malicious Assault on a Law Enforcement Officer fails as a matter of law.

a. Mr. Pierson was not acting in his official capacity as a police officer during the incident in question.

A central theme of Respondent's position is that Coty Pierson (hereinafter "Mr. Pierson") was entirely within his rights and scope of employment as an off-duty police officer when he initiated a rogue investigation into Petitioner Henry Ward (hereinafter "Petitioner" or "Mr. Ward") after being contacted by his cousin, Jeffrey Barnhouse (hereinafter "Mr. Barnhouse"). Respondent's argument attempts to muddy the waters between a police officer's duty to act when he or she perceives a crime being committed, and the limitations placed on police officers to prevent them from wielding State power in their capacity as private citizens.

Questions as to whether an individual can be convicted of malicious assault on an off-duty police officer is "purely a legal issue." *State v. Phillips*, 205 W.Va. 673, 675, 520 S.E.2d 670 678 (1999). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." *Id.* (quoting Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995)); Syl. Pt. 1, *University of W.Va. Bd. of Trustees ex rel. W.Va. Univ. v. Fox,* 197 W.Va. 91, 475 S.E.2d 91 (1996). However, even under a heightened sufficiency of the evidence standard, when reviewing the record in the light most favorable to the State, no rational trier of fact could have found the essential elements of the crime of malicious assault on a police officer beyond a reasonable doubt. *See State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The crime of malicious assault on a police officer is outlined by W. Va. Code § 61-2-10B(b), which provides:

> Any person who maliciously **shoots, stabs, cuts or wounds** or by any means **causes bodily injury** with intent to maim, disfigure, disable or kill a. . .law-enforcement officer **acting in his or her official capacity**, and **the person committing the malicious assault knows or has reason to know that the victim is acting in his or her official capacity**. . .

(emphasis added). Respondent frequently compares this matter to the facts of *State v. Phillips*, 205 W.Va. 673, 520 S.E.2d 670 (1999). However, an examination of the facts reveals material differences that clearly distinguish *Phillips* from the present matter. In *Phillips*, the defendant was convicted of assaulting a police officer at a Wal-Mart in Clarksburg, West Virginia. However, the police officer in question was "an off-duty Clarksburg police officer working in his official police officer's uniform as a privately-paid security guard for Wal–Mart. . ." *Id.* at 674. After a group of customers began to cause a disturbance, the officer was signaled by the manager to assist with the situation, which ultimately lead to the defendant assaulting the officer.

A key difference between *Philips* and the matter at hand is that Mr. Pierson did not perceive and react to "a public disturbance being committed in his presence." *Id.* at 677. Here, **Mr. Pierson and Mr. Barnhouse created the disturbance**, going out of their way to find Mr. Ward and confront him at his residence. Furthermore, the off-duty officer in *Phillips* was in full-uniform, making his identity as a police officer patently obvious. Here, Mr. Pierson testified that he was dressed in "coal miner pants. . .and a gray hoodie."[1] In *Phillips*, this Court found that the defendant was "disturb[ing] the peace of others by violent, profane, indecent or boisterous conduct or language." *Id.* at 677. **Here, Mr. Ward was not disturbing the peace of others with any such conduct.** In fact, Mr. Ward was inside his residence when Mr. Pierson and Mr. Barnhouse arrived.[2]

[1] A.R. at 372.
[2] A.R. at 362.

Furthermore, while an off-duty police officer retains "the authority and duty to ***react*** to criminal conduct at all times," **a duty to *react* is not equivalent to a duty to *seek out* criminal conduct.** *Id.* at 679 (emphasis added). In *Wright*, the officer's actions were only deemed appropriate, in part, because he was "motivated by his own perception that a violation of law occurred." *Id.* at 677. Here, Mr. Pierson did not perceive any crime taking place, and his conduct in no way furthered his "obligation as an officer to preserve the public peace and to protect the public in general." W. Va. Code § 8-14-3. Mr. Pierson did not simply stumble across Mr. Ward stealing a trail camera and react to the situation as he found it. Rather, Mr. Pierson got into a vehicle and traveled to Mr. Ward's residence to confront him, accompanied by a caravan of family members and friends, based on speculative information Mr. Pierson received from his cousin.

Respondent misguidedly states that "[t]he only evidence the Petitioner points to that Deputy Pierson was not acting in his official capacity was that Pierson was in civilian clothes and on vacation."[3] Mr. Pierson's clothes are but a fragment of the mountain of evidence Petitioner presents in support of the argument that Mr. Pierson was not acting in his official capacity. Simply put, even interpreting the facts in the light most generous to Respondent, it is clear that Mr. Pierson was acting in a private capacity during the incident in question. Mr. Pierson, violating essentially all standard arrest procedures for law enforcement officials, entered the property accompanied by multiple family members and friends[4] with no backup; no uniform[5]; no firearm[6]; no handcuffs[7];

[3] Respondent's Response Brief at Pg. 16
[4] A.R. at 345. Mr. Ward was accompanied by Jeffrey Barnhouse, Travis Carte, and his son, who was six (6) year old at the time.
[5] A.R. at 521.
[6] *Id.*
[7] *Id.*

no badge[8]; no radio; no search or arrest warrant[9]; and no direction from, or even a discussion with, superior officers regarding his anticipated actions.

There is no evidence indicating that Mr. Ward *should have been aware* that Mr. Pierson was acting in his official capacity, as required by W. Va. Code § 61-2-10B(b). In fact, neither Mr. Pierson or Mr. Barnhouse identified themselves once arriving at Mr. Ward's residence.[10] Contrary to Respondent's assertion, Petitioner never "confirmed that Deputy Pierson. . .presented to Petitioner's residence in an official capacity."[11] Mr. Ward denies ever calling Mr. Pierson "Deputy" or "Officer."[12] However, even if that evidence is accepted as true, it is not dispositive of the issue. While Mr. Ward had prior dealings with Mr. Pierson as a police officer, he had no informed knowledge of Mr. Pierson's status at the time of the incident.[13] Mr. Ward stated in his testimony that "to [his] knowledge Coty Pierson was not an officer at that point in time."[14] **The determination to be made is whether or not Mr. Ward had reason to know Mr. Pierson was acting in his official capacity as an officer.**

Police officers are trained to deescalate situations with citizens[15]; however, Mr. Pierson's and Mr. Barnhouse's conduct reveals that the duo seemingly intended to agitate the situation. Mr. Ward testified that the first thing he said when he saw the two (2) individuals was that "they were on private property and needed to leave."[16] Upon reaching his camper, Mr. Pierson and Mr. Barnhouse began verbally accosting Mr. Ward, calling him a "thief" and stating that he was going

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[8] *Id.*
[9] A.R. at 522.
[10] A.R. at 521.
[11] Respondent's Response Brief at Pg. 5.
[12] A.R. at 533; Respondent's Response Brief at Pg. 4.
[13] A.R. at 521-522.
[14] A.R. at 538.
[15] A.R. at 351.
[16] A.R. at 522-523.

to jail, which continued throughout the encounter.[17] Mr. Pierson immediately got "within 6 inches of [Mr. Ward's] face and started screaming that they had pictures of [Mr. Ward] on a trail camera and they know'd [Mr. Ward] took it and they wanted it back or [Mr. Ward] was going to jail."[18] By his own admission, Mr. Pierson was the individual who initiated physical contact with Mr. Ward after he became agitated that Mr. Pierson and Mr. Barnhouse refused to leave.[19] At trial, Mr. Pierson testified that he "leg sweeped [Mr. Ward] and got him on the ground and put my knees in his shoulder and sat there and told him to either chill out or I would sit there until an officer arrived."[20] If Mr. Pierson was truly acting in his official capacity as an officer, he would have searched Mr. Ward for weapons and likely found the firearm in his waistband, which would have prevented the entire incident. **It is clear that Mr. Pierson made no attempt to be reasonable with Mr. Ward or to temper his words or actions, and nothing about Mr. Pierson's conduct resembles that of a law enforcement official.**

It is undisputed that Mr. Ward tried to deescalate the situation many times during the incident in question: (1) when Mr. Ward called the owner of the property, Shane Montgomery (hereinafter "Mr. Montgomery")[21]; and (2) when Mr. Ward attempted to removed himself from the situation and retreat into his residence on at least three (3) separate occasions.[22] Mr. Montgomery clearly told Mr. Pierson and Mr. Barnhouse that the individuals were "trespassing and needed to leave the property."[23] No evidence suggests that Mr. Pierson notified Mr. Montgomery that he was a police officer or that he was acting in his official capacity. Upon

[17] A.R. at 523-524.
[18] A.R. at 520.
[19] A.R. at 352-353; Respondent's Response Brief, Pg. 4.
[20] A.R. at 352.
[21] A.R. at 522-523.
[22] A.R. at 369; 523.
[23] A.R. at 523.

attempting to go back into his home, Mr. Pierson physically prevented Mr. Ward from re-entering without any explanation or statement informing Mr. Ward that he was being detained.[24]

Officer Hylton's testimony at trial reveals the inappropriateness of Mr. Pierson's actions. As the events were occurring and Officer Hylton was on the phone with Mr. Barnhouse, Officer Hylton requested to speak to Mr. Pierson.[25] The first thing Officer Hylton asked Mr. Pierson was "are you on duty?"[26] Officer Hylton also stated in his report that he also asked Mr. Barnhouse if Mr. Pierson was "in uniform."[27] Officer Hylton even implied that it would have been inappropriate to visit Mr. Ward's residence **even if he was on duty**:

> Q: If you'd known that he was on duty at that time would you have asked [Mr. Pierson] to go and make inquiry?
>
> A: Be honest with you, no. I would've just – no, I wouldn't have. [28]

Respondent states that taking Petitioner's argument "to its logical conclusion, FBI agents could never be considered in 'in official capacity' as they are not uniformed. . ."[29] This statement is simply untrue, especially when considering that FBI agents are notorious for flashing official badges and identifying themselves as FBI agents. Petitioner's analysis makes clear that **such a determination requires consideration of the totality of the circumstances.** There is no single issue that is dispositive, and a law enforcement officer's attire at the time of the incident in question is simply a factor to consider when making such a determination.

Respondent also states that "off-duty EMS workers or police officers could never **react to** or assist in **unexpected emergency matters**. . .or police officers could never **react to** unexpected

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[24] A.R. at 523-524.
[25] A.R. at 324.
[26] *Id.*
[27] A.R. at 8.
[28] A.R. at 323.
[29] Respondent's Response Brief at Pg. 17.

criminal acts **occurring in their presence. . .**"[30] This is also untrue. Mr. Pierson was not reacting to an emergency situation, nor did any criminal act take place in his presence. **Mr. Pierson acted *proactively*, seeking out a confrontation with Mr. Ward and *causing* the disagreement to take place by escalating the situation.**

Respondent points to Mr. Pierson's testimony stating that he was confronting Mr. Ward "in an investigative capacity," such testimony is irrelevant to a determination as to whether Mr. Pierson was acting in his *official* capacity.[31] Testimony stating that a police officer is acting in an "investigative capacity" does not confirm that the individual is acting in his official capacity as a law enforcement officer. Any individual may "investigate" something, but that doesn't mean such investigations should be sanctioned by the government. If this were the case, police officers would be given free reign to violate citizens' civil liberties under the guise of an "investigation" without consequence.

When considering decisions that will have sweeping effects on law enforcement and the general public, policy concerns should also be taken into consideration. Public policy supports the position that Mr. Pierson was **not** acting in his official capacity as a law enforcement officer. This Court did not take its decision in *Phillips* lightly, stating that it was "concerned by the police officer's and Wal-Mart's conduct." *Id.* at 681. "[I]t does appear that this police officer and Wal-Mart went just a little overboard in its pursuit of this woman. . ." *Id.* Ultimately, this Court elected to base its ruling in a "larger context" due to the "wider import" and public policy concerns surrounding the issue. *Id.*

However, when examining both the facts of the matter as well as the "larger context" of the issue, to hold that Mr. Pierson's conduct is appropriate and committed in his official

[30] Respondent's Response Brief at Pg. 17. (emphasis added).
[31] A.R. at 364.

capacity as an officer would impermissibly allow State prosecutorial power and resources to be wielded by police officers acting in a private capacity. Off-duty police officers can play a valuable role in protecting the citizens of West Virginia and responding to emergencies, but the line must be drawn *somewhere*. Holding that Mr. Pierson was acting in his official capacity as a police officer during the incident in question will have far-reaching consequences which would drastically expand police power and harm the citizens of this State. Accordingly, Mr. Ward's conviction for malicious assault on a police officer should fail as a matter of law.

b. Even if Mr. Pierson is considered to have acted in his official capacity as a law enforcement officer, he did not sustain the requisite "bodily injury" necessary to sustain a conviction for malicious assault.

Respondent's Brief does not address Petitioner's contention that Mr. Pierson did not sustain the requisite bodily injury to achieve a guilty verdict for malicious assault of a police officer. Petitioner's claim will be reviewed under a sufficiency of the evidence standard of review, meaning that when reviewing a record in the light most favorable to the prosecution. *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). The court must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

As stated, *supra*, a "bodily injury" is required to sustain a conviction for malicious assault on a police officer. W. Va. Code § 61-2-10B(b). However, at no point in Mr. Pierson's or any other witness' account of the incident was he shot, stabbed, cut or wounded. The only "injury" which Mr. Pierson testified to was that he had "metal shavings" on his hand after the altercation.[32] Mr. Pierson stated that the remedy for his "injury" was to "just brush and wash" his hand and that he received "just little scratches" as a result.[33]

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[32] A.R. at 378.
[33] *Id.*

This "injury" was used to predicate Mr. Ward's conviction for malicious assault on a law enforcement officer.[34] However, the receipt of a splinter in an altercation involving a discharged firearm simply cannot be what the Legislature contemplated as the *actus reus* of malicious assault. Even interpreting the facts in the light most favorable to the State, no rational trier of fact could have found the essential element of an injury in the form of being shot, stabbed, cut or wounded in accordance with W. Va. Code § 61-2-10B(b). Therefore, Petitioner's conviction for malicious assault on a law enforcement officer should be reversed and remanded.

II. The Circuit Court abused its discretion when it sustained the State's objection to trial counsel's line of questioning concerning Mr. Pierson's employment status.

When Petitioner's trial counsel attempted to inquire as to Mr. Pierson's status as a police officer and the veracity of the position that he was on "vacation" at the time of the incident, the State objected on relevancy grounds.[35] Petitioner's trial counsel stated that he was inquiring as to whether Mr. Ward believed Mr. Pierson "was still a police officer or not."[36] The trial court sustained the State's objection, stating that "it's been established that [Mr. Pierson] was not on duty." *Id.* However, a defendant may only be convicted under W. Va. Code § 61-2-10B(b) if a police officer acting in his official capacity is involved. Whether or not Mr. Pierson was "on-duty" at the time is not dispositive to such determinations. Furthermore, there are legitimate questions as to the truthfulness of Mr. Pierson's claim that he was on "vacation" for a period of six (6) weeks at the time of the altercation. Such a long vacation is suspicious, and the possibility of Mr. Pierson being suspended at the time is directly related to Petitioner's charge for malicious assault on a police officer.

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[34] A.R. at 376.
[35] A.R. at 370.
[36] *Id.*

"A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 8, *State v. Blevins*, 231 W.Va. 135, 148, 744 S.E.2d 245, 258 (2013)(citing Syl. Pt. 4, *State v. Rodoussakis,* 204 W.Va. 58, 511 S.E.2d 469 (1998)). Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and such fact is of consequence in determining the action. W.Va. R. Evid. 401.

Respondent states that it was unnecessary to question Mr. Pierson further on this particular issue.[37] However, ascertaining whether or not Mr. Pierson was in fact employed as a police officer at the time in question is directly related to a material element of the crime of malicious assault on a police officer. W. Va. Code § 61-2-10B(b). Thus, the jury was not permitted to hear factual testimony regarding a material element of a crime Petitioner was charged with. Accordingly, the trial court abused its discretion when it sustained the State's objection to this line of questioning.

III. The State violated Petitioner's Constitutional immunity against double jeopardy.

A citizen's protections against double jeopardy are outlined in Article III, Section 5 of the West Virginia Constitution, and provide immunity from multiple punishments for the same offense. *State v. Wright*, 200 W. Va. 549, 552, 490 S.E.2d 636 (1997). A double jeopardy claim is reviewed *de novo. State v. McGilton*, 229 W.Va. 554, 557, 729 S.E.2d 876, 879 (2012)(quoting Syl. Pt. 1, in part, *State v. Sears,* 196 W.Va. 71, 468 S.E.2d 324 (1996)). Furthermore, the question of whether a jury was properly instructed is a question of law which is reviewed *de novo. State v. Phillips*, 205 W.Va. 673 at 674 (quoting Syl. Pt. 1, *State v. Hinkle,* 200 W.Va. 280, 489 S.E.2d 257 (1996)).

[37] Respondent's Response Brief at Pg. 20.

Every felony which the Petitioner was tried on and convicted of had the same *actus reus*: the firing of a gun one (1) time. As demonstrated, *infra*, Petitioner alleges three (3) distinct double jeopardy violations which relate to (1) Petitioner's conviction for wanton endangerment involving a firearm; (2) Petitioner's conviction for brandishing a deadly weapon; and (3) Petitioner's conviction for use and presentation of a firearm during the commission of a felony.

a. Petitioner did not intentionally relinquish his right to assert a double jeopardy violation.

Respondent takes the position is that Mr. Ward "waived any challenges to double jeopardy."[38] A waiver is present where there is **"an intentional relinquishment or abandonment of a known right or privilege."** Syl. Pt. 8, *in part*, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). Courts should "indulge every reasonable presumption against waiver of fundamental constitutional rights," such as the right to assert a double jeopardy violation, rather than "presume acquiescence in the loss" of such right. *U.S. v. Banks*, 965 F.3d 287, 293 (4th Cir.2020)(quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938)); *see also U.S. v. Morgan*, 51 F.3d 1105, 1110 (2nd Cir. 1995)("In examining a purported waiver of the double jeopardy right, we must draw all reasonable presumptions against the loss of such a right."). Furthermore, "the language of the waiver must be 'crystal clear.'" *Id.* (citing *U.S. v. Van Waeyenberghe*, 481 F.3d 951, 957 (7th Cir. 2007)). "Such a waiver by the accused may be express or implied, and may be implied by accused's conduct or may be implied by accused's action. . ." *State v. Carroll*, 150 W.Va. 765769, 149 S.E.2d 309, 312 (1966).

Mr. Ward's failure to object at trial was not an "intentional relinquishment or abandonment" of his immunity from double jeopardy. Unlike *State v. McGilton*, 229 W.Va. 554, 557, 729 S.E.2d 876, Petitioner did not plead guilty to the crimes he was charged with.

[38] Respondent's Response Brief at Pg. 21.

Furthermore, none of Petitioner's actions imply that wished to relinquish or abandon such claims. On the other hand, forfeiture of a right takes place where there is a failure to make timely assertion of the right. Syl. Pt. 8, *in part*, *State v. Miller*, 194 W.Va. 3. **Forfeiture, however, does not extinguish the error.** *Id.* In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." *Id.*

b. The Circuit Court committed a plain error when it charged and convicted Mr. Ward of malicious assault of a law enforcement officer and wanton endangerment.

The "plain error" doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made. *State v. Miller*, 194 W.Va. 3, 18, 459 S.E.2d 114, 129 (1995). This Court has defined plain error as "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *State v. McGilton*, 229 W.Va. 554 at 558 (quoting Syl. Pt. 7, *State v. Miller,* 194 W.Va. 3, 459 S.E.2d 114 (1995)).

In regard to what constitutes "error" in this Court, a "deviation from a rule of law is error unless there is a waiver." *State v. Miller*, 194 W.Va. 3, 18, 459 S.E.2d at 129. Here, the trial court committed an error when it charged Petitioner with the crimes of malicious assault of a law enforcement officer and wanton endangerment of the very same police officer. Convicting Petitioner of both crimes is clearly a "deviation from a rule of law" because it violates Petitioner's immunity from double jeopardy. *Id.* Furthermore, as stated, *supra*, no waiver exists because there was no intentional relinquishment of Petitioner's right to assert a double jeopardy violation.

An alleged error affects substantial rights if "the error was prejudicial," meaning "[i]t must have affected the outcome of the proceedings in the circuit court." *Id.* Respondent cites to *Mirandy v. Smith*, 227 W.Va. 363, 787 S.E.2d 634 (2016) to make the argument that convictions of both

wanton endangerment and malicious assault do not constitute double jeopardy in this case.[39] However, an examination of *Mirandy* reveals clear differences from this matter. In *Mirandy,* the defendant was convicted of malicious assault of a *father* and wanton endangerment of his *son.*[40] However, Petitioner was convicted of malicious assault and wanton endangerment of the same individual: Mr. Pierson.[41]

This Court ruled in *State v. Wright*, 200 W. Va. 549, 490 S.E.2d 636 (1997) that **"wanton endangerment [is a] lesser included offense of malicious assault, and thus defendant could not be convicted and sentenced for both offenses."** Officer Hylton is the law enforcement official who charged Mr. Ward with both wanton endangerment and malicious assault on a police officer.[42] When questioned as to why he charged Mr. Ward with wanton endangerment, Officer Hylton stated that it was a result of "the gun [being] pulled out and [] fired."[43] Thus, both charges sprang from a single act - the discharge of a firearm one (1) time in the presence of Mr. Pierson.

Respondent states that *Wright* does not apply to the present matter because "malicious assault of a law enforcement officer contain[s] a different element than that of wanton endangerment. . ."[44] However, *Wright* clearly provides:

> . . .convictions of both wanton endangerment and malicious assault do not always constitute double jeopardy because wanton endangerment with a firearm requires proof of an additional element, namely use of a firearm. Malicious assault does not necessarily require use of a firearm. . .**However, in this case, both convictions are predicated on a single act involving a single gunshot**

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[39] Respondent's Response Brief at Pg. 27.
[40] Respondent's Response Brief at Pg. 27.
[41] Petitioner was convicted of two (2) counts of wanton endangerment: one (1) count as to Mr. Pierson and one (1) count as to Mr. Barnhouse. Petitioner only challenges the conviction as to Mr. Pierson.
[42] A.R. at 318.
[43] A.R. at 318.
[44] Respondent's Response Brief at Pg. 28.

As demonstrated, this Court did note that such charges do not *always* constitute double jeopardy. *Id.* Furthermore, while *Wright* did not address malicious assault *on an officer*, the statutes are nearly identical and the principle remains the same. Under the present facts, a clear double jeopardy violation occurred because **"both convictions are predicated on a single act involving a single gunshot" and "[t]he malicious assault charge. . .was based entirely upon [Petitioner's] use of a firearm."** *Id.* Furthermore, unlike *Mirandy*, **both convictions concern one individual: Mr. Pierson**. Almost identical to *Wright*, "it would have been impossible for Mr. [Ward] to commit malicious assault with a single gunshot without committing wanton endangerment with a firearm." *Id.* at 640. The Circuit Court's failure to take notice of such fact was prejudicial to Petitioner because it resulted in a longer prison sentence. Therefore, this error affected Mr. Ward's substantial rights, and the fairness and integrity of the Circuit Court proceedings was negatively affected. Therefore, the principles of double jeopardy were violated by convicting and sentencing the Petitioner for both wanton endangerment and malicious assault of Mr. Pierson.[45]

c. Petitioner's conviction for brandishing a deadly weapon was a plain error because it is a lesser included offense to wanton endangerment involving a firearm.

An identical argument applies to Petitioner's conviction for wanton endangerment with a firearm and the lesser offense of brandishing a deadly weapon. W. Va. Code § 61-7-11 outlines the crime of brandishing a deadly weapon, providing:

> It shall be unlawful for any person armed with a firearm or other deadly weapon, whether licensed to carry the same or not, to carry, brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace.

[45] Petitioner was charged with two (2) counts of wanton endangerment. Petitioner is only challenging his conviction for wanton endangerment of Mr. Pierson.

The statute makes clear that Petitioner's charge of wanton endangerment involving a firearm entirely subsumes every element of brandishing a deadly weapon. In *State v. Bell*, 211 W. Va. 308, 565 S.E.2d 430 (2002), this Court held that not only is brandishing a deadly weapon a lesser included offense to wanton endangerment with a firearm, but that **failure to give such instruction at trial was reversible error**. *Id.* at 314. Thus, in accordance with this Court's holding in *Bell*, the Circuit Court's failure to properly instruct the jury constitutes plain error. Accordingly, this Court should reverse the Petitioner's conviction with instruction that he be retried with the appropriate jury instructions.

d. W. Va. Code § 61-7-15A is unconstitutional as applied to Mr. Ward, whose charges are all predicated on a single act.

The presentation of a firearm charge found in W. Va. Code § 61-7-15A violated Petitioner's immunity from double jeopardy. Respondent presents a singular argument against Petitioner's position: because the statute identifies itself as "a separate and distinct offense, and in addition to any and all other offenses provided for in this code..." Petitioner's double jeopardy rights could not have been violated.[46] However, Petitioner's Brief challenges the very Constitutionality of the statute.[47]

W. Va. Code § 61-7-15A provides, in part:

> **As a separate and distinct offense**, and in addition to any and all other offenses provided for in this code, any person who, while engaged in the commission of a felony, uses or presents a firearm. . .

(emphasis added). This charge was made in connection with Petitioner's charges for attempted murder and/or malicious assault on a law enforcement officer.[48] However, the Legislature is not empowered to legislate away Constitutional rights. In accordance with this Court's holding in

[46] Respondent's Response Brief at Pg. 29.
[47] *See* Petitioner's Brief at Pg. 17-18.
[48] A.R. at 582.

Wright, W. Va. Code § 61-7-15A is unconstitutional as applied to Mr. Ward because **his charges are all predicated on a single act.** No remedy less than reversal or remand for a new trial may correct such error.

IV. The trial court abused its discretion to favor the State throughout the trial.

a. The trial court abused its discretion in its interactions with the jury.

When deciding juror disqualification issues based on bias and prejudice, the applicable standard of review is abuse of discretion. *State v. Gilman*, 226 W.Va. 453, 702 S.E.2d 276 (2010)(citing *O'Dell v. Miller,* 211 W.Va. 285, 288, 565 S.E.2d 407, 410 (2002)). However, even under Respondent's asserted standard of review of plain error, which is outlined, *supra*, the trial court committed a reversable error.[49]

During *voir dire*, a potential juror stated that police officer testimony - a central part of the State's case - carried more weight than other witnesses.[50] After being corrected, the potential juror stated his belief that a police officer's testimony could only be impeached if the officer's dishonesty could be "proved without a reasonable doubt."[51] The potential juror was never corrected as to the last declaration. Another statement made by this prospective juror was that "[t]hey swear an oath to the Constitution, to the State, to the law; if they are honest true gentlemen of the law their witness statement is golden as far as I'm concerned."[52]

In *State v. Newcomb*, 223 W.Va. 843, 679 S.E.2d 675 (2009), this Court addressed the issue of a juror representing to the trial court that a law enforcement officer's testimony carries more weight than other witnesses. Like here, the prospective juror in *Newcomb* was denied removal for cause and eventually struck. *See Id.* The applicable test is "whether a juror can, without

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[49] Petitioner incorporates the plain error analysis located in Section III., *supra.*
[50] A.R. at 244.
[51] A.R. at 245.
[52] A.R. at 244.

bias or prejudice, return a verdict based on the evidence and the court's instructions and disregard any prior opinions he may have had." *Id.* at 859 (citing Syl. Pt. 1, *State v. Harshbarger,* 170 W.Va. 401, 294 S.E.2d 254 (1982)). This Court ultimately held that "the totality of the circumstances must be considered, and **where there is a probability of bias the prospective juror must be removed from the panel by the trial court for cause.**" *Id.* at 860 (emphasis added).

Here, the prospective juror clearly indicated a probability of bias which demonstrated an inability to disregard prior opinions to make an impartial decision. These statements demonstrate a clear probability of bias favoring law enforcement and should have resulted in this juror's dismissal for cause. Even though the juror in question was struck, no juror who heard the exchange between that potential juror and the trial court judge could possibly proceed in the trial in an impartial manner having had the exact opposite standard of proof presented and implied by the trial court. Furthermore, these misrepresentations occurred at the *very beginning* of the Petitioner's trial and, therefore, tainted the rest of the proceedings. In another instance, after the trial court had read all the way through Count Seven of the charges and jury instructions, a juror revealed that she could not hear the judge.[53] The trial court responded "[a]ll right" and continued reading the charges.[54] The Circuit Court's failure to inquire as to what the juror heard and did not hear was an abuse of discretion which prejudiced the juror and affected the integrity and fairness of the proceedings.

b. The Circuit Court abused its discretion when it inappropriately questioned witnesses and the Petitioner throughout the trial.

Respondent states that it was entirely appropriate for the trial court to conduct its own examinations of witnesses, and even the Petitioner, throughout the trial. However, by doing so the

[53] A.R. at 100.
[54] *Id.*

trial court abandoned any notion of impartiality. This Court will review a trial court's questioning of a witness under the abuse of discretion standard. *State v. Farmer*, 200 W.Va. 507, 512, 490 S.E.2d 326, 331 (1997)(quoting Syl. Pt. 1, *McDougal v. McCammon,* 193 W.Va. 229, 455 S.E.2d 788 (1995)). Respondent asserts that the appropriate standard of review is a plain error analysis; however, even under such heightened standard, the trial court committed reversable error.[55]

Rule 614(b) of the W. Va. Rules of Evidence states that "[t]he court may interrogate witnesses, whether called by itself or by a party, but in jury trials **the court's interrogation shall be impartial so as not to prejudice the parties.**" *Id.* (emphasis added); W. Va. R. Evid. 614(b). At trial, the Court took it upon itself to question witnesses[56] and even the Petitioner outside of his actual testimony.[57] The trial court questioning witnesses is not, on its face, an abuse of discretion. *See State v. Farmer*, 200 W.Va. 507, 512, 490 S.E.2d 326, 331 (1997). However, Respondent ignores the facts that the trial court may only do so "so long as such intervention does not operate to prejudice the defendant's case." *Id.* This Court further stated that "judges cannot assume advocacy roles or intimate opinions by their questioning." *Id.* (quoting *State v. Massey,* 178 W.Va. 427, 435–36, 359 S.E.2d 865, 873–74 (1987)).

After both parties were finished questioning Petitioner, the trial court initiated its own line of questioning which, whether intentional or not, highlighted facts which were favorable to the State.[58] At another point, the trial court allowed Mr. Pierson to clarify contradicting testimony regarding the incident with the firearm.[59] Even if such questioning by the trial court "sought only to clarify the prior testimony," as Respondent states, it still indicated bias in favor of the State.[60]

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[55] Petitioner incorporates his plain error analysis located in Section III, *supra.*
[56] A.R. at 382-383.
[57] A.R. at 543-544.
[58] *Id.*
[59] A.R. at 382-384.
[60] Respondent's Response Brief at Pg. 34.

The result was prejudicial error which affected the integrity and fairness of the proceedings. At the very least, the conduct of the trial court is indicative of a trial court acting as or propping up the State in a manner which is inappropriate and improperly biases the jury.

V. Petitioner sufficiently outlined the proper standard of review pertaining to each assignment of error.

Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure provides:

> The brief must contain an argument exhibiting clearly the points of fact *and law* presented, *the standard of review applicable, and citing the authorities relied on* ... [and] must contain appropriate and specific citations to the record on appeal[.]

(emphasis added). In accordance with Rule 10(c)(7), the argument section of the petitioner's brief "must contain appropriate and specific citations to the record on appeal. . ." *State v. Trail*, 236 W.Va. 167, 186, 778 S.E.2d 616, 635 (2015).

Petitioner's Brief adequately cites the points of fact and law presented in accordance with Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure. Petitioner's Brief states the appropriate standards of review on Pgs. 7, 9, 16, 19, and 21.[61] Furthermore, the citations to the authorities relied upon in Petitioner's Brief incorporate the appropriate standard of review for each assignment of error. However, in regard to any confusion as to the appropriate standard of review as applied to each respective assignment of error, Petitioner further opines on such standards, *supra*.

CONCLUSION

In conclusion, Petitioner's trial in this matter was clearly plagued with error and abuse of discretion. Petitioner's procedural and substantive due process rights were violated; Petitioner was denied his constitutionally guaranteed protection against double jeopardy on the majority of the counts for which he was convicted; legitimate questions regarding Mr. Pierson's status as an

[61] *See* Petitioner's Brief.

officer were kept from being discussed; and the trial court abused its discretion and made key errors which undoubtedly influenced the jury and fomented bias against Petitioner. A review of the totality of the circumstances reveals that Petitioner did not receive a fair trial, and the only remedy to be a reversal of his conviction and a remand for a new trial.

WHEREFORE, the Petitioner seeks reversible of the conviction, a remand with instructions to correct errors, and a new trial.

Signed: Troy N. Giatras

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Attorney of Record for Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0806

HENRY JO WARD,
DEFENDANT BELOW,

PETITIONER,

Appeal from an Order of the Circuit Court of Fayette County, (Indictment No. 21-F-150)

v.

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW,

RESPONDENT.

CERTIFICATE OF SERVICE

I, Troy N. Giatras, hereby certify that a true and correct copies of the foregoing ***Petitioner's Reply Brief*** was served upon the following person via United States Mail, postage prepaid, in a sealed envelope, as indicated below:

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